

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7807

Petition of Vermont Transco LLC, and Vermont)
Electric Power Company, Inc., for authority,)
pursuant to 30 V.S.A. § 248a, to install wireless)
communications facilities in Derby, Vermont, as)
part of a statewide radio project)

Order entered: 11/16/2011

I. INTRODUCTION

In this Order, the Vermont Public Service Board ("Board") approves the application filed on September 16, 2011, by Vermont Transco LLC, and Vermont Electric Power Company, Inc. (collectively, "VELCO" or the "Petitioners"), pursuant to 30 V.S.A. § 248a, and the Board's Procedures Order ("Procedures Order"),¹ and grants the Petitioners a certificate of public good ("CPG") authorizing the installation of telecommunications facilities in Derby, Vermont (the "Project").

II. BACKGROUND

This case involves a petition and prefiled testimony filed by the Petitioners on September 16, 2011, requesting that the Board issue a CPG, pursuant to 30 V.S.A. § 248a, authorizing the installation of telecommunications facilities in Derby, Vermont.

On September 23, 2011, the Board received a copy of minutes from a Town of Derby Selectboard meeting regarding the Project, and a copy of a letter from the Selectboard to the

¹ *Amended order implementing standards and procedures for issuance of a certificate of public good for communications facilities pursuant to 30 V.S.A. § 248a*, Order issued August 10, 2011.

Petitioners granting conditional approval of the Project based upon the Petitioners conducting a long-term electromagnetic exposure study.²

On October 4, 2011, the Petitioners filed a response to the Derby Selectboard's September 23 filing.

On October 5, 2011, the Vermont Department of Public Service ("Department") filed a letter with the Board recommending that the Board issue an order approving the Project without further hearings or investigation.

On October 7, 2011, the Board received a letter from the Derby Selectboard requesting "that a hearing(s) be held by the Public Service Board" on the Project.

On October 7, 2011, Robert Cooper and Mark and Sharon Tarbox (the "Neighbors"), neighboring landowners to the proposed Project site, filed comments and a request for a hearing on the project.³

On October 21, 2011, the Petitioners filed a response to the Neighbors' comments.

No other comments or requests for hearing regarding the Project have been filed with the Board.

The Board has determined that, for the reasons set forth below, the Derby Selectboard and the Neighbors have failed to show that the petition raises a significant issue regarding the applicable substantive criteria of 30 V.S.A. § 248a. The Board has determined instead that the petition and prefiled testimony have effectively addressed those criteria. Consequently, we find that the procedure authorized by § 248a is sufficient to satisfy the public interest, and no hearings are required.

III. FINDINGS

1. The Project is part of VELCO's Statewide Radio Project ("SRP") that involves the creation of a private mobile communications network consisting of multiple wireless

2. The materials were filed without a cover letter or other explanation as to why the materials were filed with the Board. The materials also do not include any recommendations from the Selectboard to the Board regarding its approval of the Project.

3. The Tarbox property adjoins the Project site property, while Mr. Cooper is not an adjoining landowner.

communications facilities. The facilities will be located throughout the state for purposes associated with utility installations, repair and maintenance of infrastructure and emergency response. Nelson/Chitwood pf. at 3-4.

2. The Project is to be located at an existing telecommunications facility at 3557 Nelson Hill Road in Derby, Vermont. The Project site consists of a 200' by 200' leased area within a 200-acre property located atop Nelson Hill in Derby, owned by James and Deborah Brown. The Brown property currently includes two 100' telecommunications towers in addition to a 60' tower which the Petitioners intend to replace with a new tower. A fourth 170' tower is located on an adjoining property on Nelson Hill. Nelson/Chitwood pf. at 3-4, 7-9.

3. The Project includes the replacement of an existing 60' guyed tower with a new 115' self-supporting tower with six antennas mounted on the new tower at varying heights. The Project also includes a new 12' by 20' equipment shelter and a 500-gallon aboveground propane tank mounted on a 4' by 12' platform, within a 40' by 40' fenced gravel compound. Overhead and underground telecommunications lines will be extended to the compound from existing utility poles at the site. Nelson/Chitwood pf. at 7-8.

4. The Project will result in 4,350 square feet of total earth disturbance. Nelson/Chitwood pf. at 8.

5. The Project will not have an undue adverse impact on floodways, the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas. This finding is supported by findings 6-9, below.

6. The Project involves the replacement of one of four existing telecommunications towers located on Nelson Hill and will, therefore, have a minimal visual effect on surrounding vantage points. Accordingly, the installation of the facilities will not have an undue adverse effect on aesthetics when viewed in the overall context of the site. Smith/Griffin pf. at 15-19.

7. There are no rare or irreplaceable natural areas, wildlife habitat, or endangered species within the vicinity of the Project. Tomberg pf. at 8-9.

8. There are no historic sites within one-half mile of the Project site. Smith/Griffin pf. at 14.

9. The Project is not located in a floodway. Tomberg pf. at 7.

IV. DISCUSSION

The Neighbors' Comments

The Neighbors contend that the Project raises significant issues related to "potential undue adverse effects on air purity and the public health and safety."⁴ In support of their contention, the Neighbors argue that the Petitioners have not performed adequate radio frequency emission testing of the Project as requested by the Derby Selectboard.⁵ The Neighbors also contend that the Project is not of limited size and scope and, therefore, "is entitled to Hearing(s) under a regular Section 248a proceeding." The Neighbors maintain that the Project could have been avoided by collocation of the Project antennas on an existing tower.⁶ The Neighbors also express concerns regarding future collocation of antennas on the Project tower. The Neighbors argue that the Natural Resources Board was not given sufficient notice of the Project and that review of the Project should fall under the jurisdiction of the Natural Resources Board.⁷

The Petitioners maintain that the Neighbors' comments "assert no specific interests nor offer any evidence demonstrating how those interests will be affected."⁸ Petitioners assert that they have "undertaken significant efforts to measure and evaluate the level of radio frequency emissions on Nelson Hill" and that the "level of emissions following installation of the Project will be less than 40% of the Federal Communications Commission's maximum permissible exposure standards."⁹ Further, the Petitioners state that they offered to conduct additional studies within the Tarboxes' residence, but the Tarboxes refused this offer.¹⁰ The Petitioners state that they explored the possibility of collocating its facilities at one of the existing towers on the site

4. Neighbors' comments at 1.

5. *Id.* at 2.

6. *Id.* at 3.

7. *Id.* at 4.

8. Petitioners' Response 10/21/11 at 2.

9. *Id.* at 3.

10. *Id.*

and concluded that the replacement of one of the existing towers "represented a more reasonable, feasible long-term siting solution."¹¹ The Petitioners represent that, while the Project tower will be capable of accommodating additional tenants, the Petitioners are not proposing any additional tenants at this time. The Petitioners maintain that the tower they are proposing to replace predates Act 250 and has never been issued an Act 250 permit and, therefore, advance notice of the Project to the Natural Resources Board is not required under § 248a. The Petitioners also assert that even if the existing tower was subject to Act 250 jurisdiction, the new tower contemplated as part of the Project has been applied for under § 248a and is, therefore, exempt from Act 250 review.¹²

The procedures governing Board approval of communications facilities are set forth in 30 V.S.A. § 248a. Section 248a(l) provides that the Board:

may issue rules or orders implementing and interpreting this section. In developing such rules or orders, the board shall seek to simplify the application and review process as appropriate . . .

In order to implement the statute the Board adopted the Procedures Order. In accordance with § 248a(b)(3), the Procedures Order, at Section II, defines a project of "limited size and scope" as:

a new telecommunications facility, including ancillary improvements, that does not exceed 140 feet in height; or an addition, modification, replacement, or removal of equipment at an existing telecommunications facility or support structure, and ancillary improvements, that would result in a total facility height of less than 200 feet and does not increase the width of the existing support structure by more than 20 feet. In order to qualify as a project of limited size and scope, construction of the project shall not result in earth disturbance of more than 10,000 square feet of earth, excluding temporary earth disturbance associated with construction activities.

As required by § 248a (c)(1), and set forth in Section IV(H) of the Procedures Order, in reviewing projects of limited size and scope the Board conditionally waives:

all criteria under 30 V.S.A. § 248a (c)(1), with the exception of 10 V.S.A. §§ 6086(a)(1)(D) (floodways) and 6086(a)(8) (aesthetics, historic sites, rare and irreplaceable natural areas, endangered species, necessary wildlife).

11. *Id.* at 4-5.

12. *Id.* at 7-8.

In accordance with § 248a(j)(2)(A), Section VIII of the Procedures Order sets forth the procedure and timeframe for submitting comments and requesting a hearing on an application:

If any person wishes to submit comments or motions to intervene to the Board concerning an application . . . or request a hearing . . . , such correspondence is due at the Board within 21 calendar days of the date that the application was submitted to the Board and all required recipients. In order to request a hearing, commenters must make a showing that the application raises a significant issue regarding one or more of the substantive criteria applicable to the proposed project.

Finally, under Section IV of the Procedures Order, applicants are required to notify recipients of the application of the procedures and timeframe for submitting comments and requesting a hearing on an application.¹³

The proposed Project includes the replacement of an existing tower and ancillary improvements at an existing telecommunications facility. The new tower will be 115' in height and the improvements will result in 4350 square feet of earth disturbance. Therefore, the Project qualifies as a facility of "limited size and scope" as defined in § 248a(b)(3) and the Procedures Order. In reviewing projects of limited size and scope, the Board conditionally waives all review criteria with the exception of 10 V.S.A. §§ 6086(a)(1)(D) and (a)(8). In this case the Neighbors have raised various concerns regarding the Project; however, none of these concerns are related to the substantive criteria under which the Project is reviewed. Therefore, the Neighbors' request for a hearing in this matter is denied. Even if we were to consider the Neighbors' objections under the waived criteria, the Neighbors have not shown that the Project raises a significant issue with respect to those criteria. The electromagnetic field exposure studies performed by the Petitioners demonstrate that exposure will be well within the limits prescribed by the FCC. The Neighbors have not provided any basis to doubt the Petitioners' analysis or to conclude that the Project will have an adverse impact on air purity or any other waived criteria. We are also satisfied that the Petitioners have taken reasonable steps in exploring potential collocation

13. On June 17, 2011, the Petitioners filed the required 45-day advance notice with the required recipients, including the Town of Derby and the Tarboxes. The notice, at Section V, describes the comment period and requirements for submitting comments and hearing requests to the Board.

opportunities. With respect to the Neighbors' assertions regarding Act 250, we conclude that these assertions are unfounded. Pursuant to § 248a(h), an "applicant that has obtained or been denied a permit . . . under the provisions of Title 24 or chapter 151 of Title 10 for the construction of a telecommunications facility may not apply for approval from the board for the same or substantially the same facility" In this case, the Petitioners have not sought such approval for the Project prior to applying to the Board for approval. Therefore, the Petitioners are not barred from seeking Board approval for the Project.

The Selectboard's Comments

With respect to the Derby Selectboard's request for a hearing, we conclude that they have not provided sufficient support for the request. As noted above, in order to request a hearing commenters must show that the Project "raises a significant issue" with respect to the applicable criteria. The letter from the Selectboard simply requests that the Board hold a hearing and does not state that the Project raises any significant issues or provide any basis for convening such a hearing. Therefore, the Selectboard's request for a hearing in this matter is denied.

V. CONCLUSION

Based upon all of the above evidence, the petition does not raise a significant issue with respect to the relevant substantive criteria of 30 V.S.A. § 248a, the public interest is satisfied by the procedures authorized in 30 V.S.A. § 248a, and the proposed Project will promote the general good of the State.

VI. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that the installation and operation of communications facilities at the location specified in the above findings, by Vermont Transco LLC, and Vermont Electric Power Company, Inc, in accordance with the evidence and plans submitted in this proceeding, will promote the general good of the State of Vermont in accordance with 30 V.S.A. § 248a(a), and a certificate of public good to that effect shall be issued in this matter.

Dated at Montpelier, Vermont, this 16th day November, 2011.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: November 16, 2011

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.